89-485

NO.

In the Supreme Court of the United States

October Term, 1989

VICTOR ALEXANDER, M.D.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Writ of Certiorari - Criminal Case

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QUESTIONS PRESENTED FOR REVIEW

This case seeks review of the conviction of Victor Alexander, M. D. for bank robbery in violation of 18 U.S. C. A. 2113(a). It involves the following questions:

1. In a prosecution based solely on casual eyewitness identification, can the preclusion of defense evidence that impeached the identification of two of the government's three witnesses be harmless error when the defense was that of mistaken identity?

2. Was the defendant in a criminal prosecution denied his constitutional right to testify on his own behalf when the trial court denied his request for a brief continuance in order to remedy an acute, temporary medical disability?

LIST OF PARTIES

As set forth in the caption of the case in this Court, the parties in this criminal case are as follows:

1. Petitioner: Victor Alexander, M.D.(Defendant-Appellant below).

2. Respondent: United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Victor Alexander, M.D., Defendant-Appellant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 28, 1989 (rehearing denied on April 27, 1989) affirming the conviction of Victor Alexander, M.D. for a violation of 18 U.S.C.A. 2113(a) by a jury in the Eastern District of

Louisiana on August 10, 1987.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix "A", *infra* , p. A-1- A-9) is reported in ___ F.2d .___, (5th Cir. 1989).

JURISDICTIONAL GROUNDS IN THIS COURT

The opinion of the Court below (Appendix "A", *infra*, p. A-1-A-9), was entered on March 28, 1989. Defendant timely applied for a rehearing and this Application for Rehearing En Banc was denied by the Court (Appendix "B", *infra*, p. B-1-B-2) on April 27, 1989. The Mandate of the Court in this matter (Appendix "C", *infra*, p. C-1 - C-2) was issued on May 8, 1989. The jurisdiction of this Court to review the Judgment of the Court of Appeals by Writ of Certiorari is invoked under 28 U.S.C.A., §1291; 1294.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. **The Fifth Amendment**, United States Constitution, which provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in land or naval forces, or in the Militia, when in acutal service of time of

War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. **The Sixth Amendment**, United States Constitution, which provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. **The Fourteenth Amendment**, United States Constitution, which provides: (Section 1) All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the protection of the laws....

4. **Federal Rule of Criminal Procedure 16(b)(1)(A)**, which provides: If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

5. **Federal Rule of Criminal Procedure 16(d)(2)**, which provides: If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

6. The statute under which the Petitioner was prosecuted, though nothing turns on its terms, was 18 U.S.C.A. § 2113(a), which provides as follows:

§ 2113(a). *Bank robbery and incidental crimes*

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any

property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny --

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated as follows:

A. Course of Proceedings In The Criminal Conviction Before This Court.

On August 10, 1987, in a cause then pending in the United States District Court for the Eastern District of Louisiana, Division "G", entitled "United States of America v. Victor Alexander, M.D.", Criminal No. 85-243, Petitioner was found guilty by a jury on an indictment of one count charging a violation of 18 U.S.C.A. , § 2113(a), relative to bank robbery.

On February 24, 1988, Petitioner was sentenced to three (3) years imprisonment. Petitioner remained free on bond from

the time of his arrest in May of 1985 through his sentencing. He was allowed to self-surrender to the LaTuna Federal Prison Facility in Anthony, New Mexico on April 29, 1988.

On February 24, 1988, Petitioner filed a Notice of Appeal (5 R. 1352). Appellate briefs were filed by the Petitioner and the Government. An *amicus curiae* brief was filed on behalf of the Petitioner by the Louisiana Association of Criminal Defense Attorneys. On March 28, 1989, the judgment and sentence were affirmed by the Court of Appeals for the Fifth Circuit, United States of America v. Victor Alexander, M.D., No. 88-3143 ____ F.2d ____ (5th Cir. 1989). (Appendix "A")

On April 12, 1989, Petitioner filed an Application for Rehearing En Banc under the provisions of Rule 40 of the Federal Rules of Appellate Procedure.

On April 28, 1989 the Court of Appeals denied Petitioner's Application for Rehearing (Appendix "B") and the Court's Mandate in this matter was issued on May 8, 1989 (Appendix "C").

B. Relevant Facts Concerning The Underlying Conviction for Bank Robbery.

In furtherance of his defense of mistaken identification, the defendant sought to present the testimony of Robbery Detective Ronald Richards concerning a photographic lineup he had conducted in the course of the New Orleans Police Department's investigation into the May 21, 1985 robbery of Central Savings & Loan - an investigation occurring concurrent with the one conducted by the Federal Bureau of Investigation (FBI). The testimony of Richards and the supporting exhibits

from the police files would have established that the six (6) mug shots used as fill-in photographs by FBI agent Michael Holeman in his seven (7) photograph line-up (the additional photograph being the Louisiana driver's license photo of Dr. Alexander) on May 24, 1985 were black and white copies of the exact same color photographs previously shown to two (2) of the three (3) witnesses on May 22, 1985 by N.O.P.D. Detective Richards. Significantly, the two (2) bank employees had rejected all of the pictures shown them by Richards indicating none of the casually attired men whose pictures they viewed were the robber. The subsequent FBI photographic line-up therefore contained six (6) previously rejected pictures and the newly added picture of Dr. Alexander who alone was attired in a jacket and tie, the type of clothing worn by the robber.

The Government objected to the introduction of this defense evidence on the ground that it had not been timely shown the documents in question as required by Rule 16(b)(1)(A) of the Rules of Federal Criminal Procedure. In addition, it sought to have the material excluded under the sanction provision of 16(d)(2). After an evidentiary hearing held outside the presence of the jury, the trial court precluded the defense from introducing any evidence about the Richards-conducted photographic line-up.

The defense objected to the trial court's ruling and was allowed to file a written proffer in the Record. This Proffer included the entire Robbery Unit's investigative file, produced in response to a *subpoena duces tecum*.. The file contained the color mugshots shown to the bank witnesses by Detective

Richards, the "daily" report[1] prepared by him on the photographic display, other dailies, handwritten notes made on calendars and napkins, business cards, a lab technician's report and a copy of the FBI investigative file earmarked for delivery to Richards. The proffer also contained page 123 of the Detective Bureau's Log Book showing that the daily report form in question had been signed out to Richards for his preparation.

On the Friday before the scheduled August 3, 1987 trial date, the defense requested a ten (10) day to two (2) week continuance of trial due to the extreme and debilitating anxiety of Dr. Alexxander that would prevent him from testifying in the upcoming trial as he had done in his first trial on the charge two years earlier. Expert testimony presented by the defense established that if given the requested continuance, anti-depressant medication could be prescribed and would ameliorate the temporary and unanticipated medical disability

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[1]The reports in the robbery division investigative file are referred to throughout the transcript as "dailies". Dailies are serially numbered blank report forms that are used by officers of the Detective Bureau to report various phases of an investigation subsequent to the initial incident report. Each daily is recorded, at the time it is taken, in the Daily Log Sign-Out Book by number, item number of incident for which it is used, date signed out, name of person taking the form, and a number indicating the type of crime. As example, the "daily " that was used by Detective Richards to report the photographic line-up conducted by him was No. 006171. It is recorded on Page 123 of the Daily Log Sign-Out Book (a bound ledger book with numbered pages) between dailies No. 006170 and 006172. The entry shows it was used for item #E-25257-85 by Detective Richards on May 22, 1985, and that this was part of an investigation of a bank robbery, federal (64F).

of the Petitioner. After hearing the testimony of a court-appointed cardiologist, the Petitioner, his treating psychiatrist, and his attorney, the trial court denied the request.

The Petitioner did not testify at trial in his own defense and consequently no personal or professional information was provided to the jury about him (See Appendix "E" for the content of this information) and no alibi testimony was presented as to his exact whereabouts at the trime of the crime. (the transcript of Dr. Alexander's testimony at his first trial which sets forth this material is contained in 12 R. 313-392.)

Petitioner was on forty (40) milligrams of Valium throughout his trial, as per his psychiatrist's medical advice.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Court of Appeals has decided a federal question in a way that is in conflict with applicable decisions of this Court, especially given the contextual setting of a prosecution based

A. Preclusion Of Evidence About A Previous Photographic Lineup

In reaching its decision, The Fifth Circuit ruled that the preclusion of evidence concerning the previous photographic lineup was harmless because it applied to only two of the three government witnesses. Petitioner respectfully urges that this holding is erroneous and at variance with this Court's decisions, particularly in the determination of what constitutes "material" evidence to a defendant and in the interpretation and application of the harmless error standard of review.

The compulsory process clause of the Sixth Amendment of the United States Constitution guarantees the right of an accused to present relevant, probative and otherwise admissible evidence in his defense. So fundamental is a defendant's guarantee to a fair trial that the exclusion of such evidence has been held to be an extreme sanction only justified by some overriding policy consideration. **Taylor v. Illinois**, ___ U.S. ___, 108 S. Ct. 646 (1988); **United States v. Davis**, 639 F. 2d 239, 243 (5th Cir. 1981). An error committed by the trial court in excluding such relevant defense evidence is clearly one of constitutional proportion. **United States v. Davis**, *Id* at 245.

The trial court in its denial of a new trial and both the Petitioner and Government in their briefs on appeal attempted to distinguish and/or apply the recent decision of this Court in **Taylor v. Illinois**, *supra*, to the facts of the instant case. In its decision, the Fifth Circuit dismissed such efforts, noting that outside of egregious situations in which counsel deliberately and consistently violate discovery, "the Supreme Court's decision in Taylor gives us little guidance for determining when the preclusion sanction is permissible." (Appendix "A", p. 8.)

Though the Fifth Circuit opted to express no opinion on the issue, Petitioner argues that the instant case is obviously not a **Taylor** reinactment in which an unknown witness emerges from thin air long after the crime occurred and the attempt of defense counsel to provide an explanation is exposed as a lie. Unarguably, the existence of Richards was within Agent Holeman's knowledge and therefore that of the

prosecution, from minutes after the robbery, when he arrived at the crime scene. This was months before Richard's involvement in the case was discovered by the defense. In addition, the trial court's questioning of Richards, under oath and outside the presence of the jury, substantiated the veracity of representations made by defense counsel in explanation for the technical discovery violation.

Further, this case does not present a **Chappie v. Voss**, 843 F. 2d 25, 34 (1st Cir. 1988) situation in which the defense in a "parlous situation" opted for "a back-alley trick" in an attempt to extricate a defendant who was "caught red handed with a kingsize quantity of contraband" and called an expert to the stand who had secretly sat in court listening to the government's chemist and was then going to testify on complicated chemical technicalities.

Petitioner submits that the goal of this Court in **Taylor** was to protect the integrity of the justice system from purjurious evidence, not to provide lethal ammunition by which enables the prosecution to win by preclusion and exclusion a conviction it could not achieve on a full presentation of the defense evidence. Any such attempt by the prosecution to play a win-at-any-cost-game would be as equally menacing to the integrity of the adversary process as the **Taylor-Chappie** variety of defense counsel conduct. Accepting petitioner's writ appication would afford this Court with the opportunity to clarify which, if any circumstances other than those in **Taylor**, would justify the extreme sanction of precluding defense evidence that is both relevant and material to the crucial issue in a criminal case and alloe it to

provide the guidance sought by the Fifth Circuit in determining the applicability of **Taylor** to non-egregious defense discovery violations.

Though avoiding **Taylor** considerations, the Fifth Circuit based its decision on the determination that the preclusion in question was harmless. Consideration of this issue was appropriate because the majority of federal constitutional errors,[2] must be evaluated in light of harmlessness beyond a reasonable doubt in the context of the whole record, **Frisco v. Blackburn**, 782 F. 2d 1353, 1356 (5th Cir. 1986); **United States v. Williams**, 616 F. 2d 759, 761 (5th Cir. 1980), *cert denied*, 449 U.S. 857 (1980).

The Fifth Circuit failed, however to apply the harmless error test set forth by this Court in **Chapman v. California**, 386 U.S. 18 (1967). This standard requires:

> the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained in order for the error to be harmless. *Id.* at 24. [see also: **Rogers v. Lynaugh**, 848 F. 2d 606, 612 (5th Cir. 1988)]

As stated in **Fahy v. Connecticut**, 375 U.S. 85, 86-87 (1963), the issue is not "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of." Rather, the "question is whether here is a reasonable possibility that the evidence complained of

[2]Some constitutional errors have been held to render a trial so fundamentally unfair as to require reversal without regard to the evidence in the particular case. See: **Payne v. Arkansas**, 356 U.S. 560 (1958), (introduction of coerced confession); **Gideon v. Wainwright**, 372 U.S. 335 (1963) (complete denial of the right to counsel); **Tumey v. Ohio**, 273 U.S. 510 (1927) (adjudication by biased judge).

might have contributed to the conviction". A reviewing court must determine if, absent the constitutional error complained complained of, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty. **United States v. Hasting**, 461 U.S. 499, 511 (1983); **Passman v. Blackburn**, 797 F. 2d 1335, 1349 (5th Cir. 1986); **United States v. Dotson**, 817 F. 2d 1127, 1135 (5th Cir. 1987); **Rogers v. Lynaugh**, *supra* at 612.

Though the constitutional error addressed in **Chapman**, *supra*, was one of wrongful admission of evidence against a defendant, this Court has now definitively confirmed that the same harmless error test is applicable to cases involving the wrongful preclusion of defense testimony. **Delaware v. Van Arsdale**, ___ U.S. ___, 106 S. Ct. 1431 (1986). In such cases, the appropriately modified version of the harmless error question is set forth as follows: assuming that the damaging potential of the precluded evidence was fully realized, might the reviewing court say that the error was harmless beyond a reasonable doubt.

In reaching its decision in the instant matter, the Court of Appeals ignored controlling United States Supreme Court jurisprudence on the very issue in point, never even giving lip service to the relevant standard; further, it seemingly dismissed long-standing, well-established Fifth Circuit precedent mandating that the **Chapman** harmless error analysis be applied to this situation.

The Fifth Circuit herein accepted the defense position that the precluded evidence of the previous photographic lineup was relevant and material to the defense of mistaken identification

thereby agreeing, albeit *sub silentio*, that an error of constitutional magnitude concerning the compulsory process clause of the Sixth Amendment was involved. Because materiality of evidence to the defense is measured on a sliding scale, directly in inverse proportion to the strength of the government's evidence against the accused, what is "material" to the defense in a prosecution such as the instant one, may under other circumstances, be trite and inconsequential. This Court has held that :

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt... This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." **United States v. Valenzuela-Bernal**, 458 U.S. 858, 868 (1982); quoting **United States v. Agurs**, 427 U.S. 97, 112-113 (1976), (footnotes omitted)

Any evidence that would impeach the identifications of two of the government's three witnesses in a prosecution based solely on casual eye witness identification must be acknowledged as is material in the eyes of this Court.

Though acknowledging that the precluded lineup constituted competent evidence vis-a-vis the defense of mistaken identification and "tainted" the identifications made by two of the eyewitnesses, the panel nonetheless wrote:

> Accepting this contention as true, the identification

> by the third witness remains untainted. The untainted witness is Ms. Ozio, who was the victim/teller in this robbery. She, of all the witnesses, had the best opportunity to observe the perpetrator. (Opinion No. 88-3143 of March 28, 1989, pages 9-10)

With seeming "knee jerk reaction," the Fifth Circuit concluded that the remaining eyewitness identification, which was not alleged to have been affected by the previous photographic lineup, constituted sufficient evidence upon which a guilty verdict could have been rendered. Consequently, it held the error in question would not have altered the outcome of the trial. Such a conclusion does not comport with the principles of **Chapman** and its progeny. The Fifth Circuit itself has noted, "Our determination that the evidence was sufficient to support the conviction does not mean that the error can be considered harmless." **United States v. Eiland**, 741 F. 2d 738, 743 (5th Cir. 1988). An error is harmless only when, after reviewing the facts of the case, the evidence adduced at trial and the impact the constitutional violations had on the trial process, the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. (emphasis added) **Sawyer v. Butler**, 848 F. 2d 582, 294 (5th Cir. 1988); **United States v. Eiland**, *supra*; **Richardson v. Lucas**, 741 F. 2d 753, 755 (5th Cir. 1984); **Germany v. Estelle**, 639 F. 2d 1301, 1303 (5th Cir. 1981), *cert. denied*, 454 U.S. 850 (1981); **Harryman v. Estelle**, 616 F. 2d 870, 876 (5th Cir. *en banc* 1988), *cert. denied* 449 U.S. 86 (1980).

In its decision, the Court of Appeals failed to examine

he quality and nature of the evidence against Dr. Alexander in the customary manner for doing so. Had the panel scrutinized the record, it would have been confronted with documentary evidence in the form of a video tape of the robbery, identified as "government exhibit 3", that specifically established the length of time that the robber stood in front of Ms. Ozio - who was the remaining eyewitness to the crime and on whose testimony it upheld the instant conviction - was thirty-eight (38) seconds, in the course of which she diverted her eyes from the robber to read the demand note he presented her. The trial transcript also provided Ms. Ozio's own sworn testimony as to her state of mind during the extremely brief time it took for the crime to occur. When asked on cross-examination:

> Q: And in fact, when we look at the video and show (sic) [see] you after the robbery, you are, fairly stated, frantic?
>
> She answered:
>
> A: Basically, yes. (17 R. 128)

Her condition is further amplified by the following colloquy:

> Q: And in fact your extreme emotional upset persists for ten minutes or so does it not?
>
> A: After he leaves, I guess (sic) [I] panicked for a few minutes, yes. (*Id.*)

The Fifth Circuit formally and unanimously declared that the instant case contains no physical evidence of any nature against the accused (Appendix "A" p. 4.) It further ruled that

the only evidence linking Dr. Alexander to the bank robbery was casual eyewitness identification. It is obvious from the record that the government attempted to compensate for this lack of physical or corroborative evidence at trial by structuring its case around the fact that three eyewitnesses identified Dr. Alexander as the robber.

The existence of three identifications was the unifying theme of the prosecution's opening statement and closing argument during which the prosecution exhorted the jury no less than eighteen (18) times[3] to remember that its case consisted of the combined effect of three eyewitnesses who made positive identifications. The theory of the government's case was pellucid; namely, with the positive identification of not one, not two, but three eyewitnesses, the guilt of Dr. Alexander was proven beyond a reasonable doubt, no matter what the defense photographic comparison expert said to the contrary.[4]

When reversing another conviction resulting from a prosecution based solely on lineup identification, determined to have been wrongfully admitted, the Fifth Circuit admonished:

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[3] See Appendix "D" for a detailed listing of the passages from the opening statement and closing argument ofthe grosecution that support this allegation.

[4]The comparison photos of Dr. Alexander and the robber which were presented at trial by the retired FBI photographic comparison expert who testified on behalf of the defense are set forth on pages 28 and 29 of this petition. (See also: Appenndix "F")

> The extensive reference to it and the placement of those references, in the face of no other evidence against the defendant preclude a finding that the error complained of did not contribute to the conviction. **Frisco v. Blackburn**, *supra* at 1356. (Emphasis added)

Upon examination of the entire record in the instant case and after assuming the full desired effect of the precluded evidence, it is reasonably possible that "honest, fair-minded j jurors might very well have brought in a not guilty verdict," (**Chapman**, *supra* at 24). Had it applied the principles of **Chapman** and its progeny, including **Frisco v. Blackburn**, *supra*, the Fifth Circuit could not have held that the testimony of this sole witness (a victim who was so panicked over the incident as to be initially unable to remember, until viewing the bank surveillance photographs in the presence of the FBI, that the robber wore a tie [17 R. 165]) constituted "overwhelming evidence" of Dr. Alexander's guilt. Consequently, it cannot be demonstrated beyond a reasonable doubt that exclusion of the previous photographic lineup, which the Court of Appeals accepted as impeaching of two of the eyewitnesses, was harmless error, given the government's emphasis on the combined strength of three identifications and the defense of mistaken indentification which was supported by expert scientific photographic comparison testimony.

This is especially so in light of the Fifth Circuit's recognition in **United States v. Moore**, 718 F. 2d 1308, (5th Cir. 1986) of the special care and duty owed in criminal cases where the only evidence against an accused is "casual eyewitness identification", and its pronouncement in **Frisco**

v. Blackburn, that:

> Since the lineup identification was the only direct evidence of his guilt, any error (regarding it) could not be deemed harmless beyond a reasonable doubt. *supra*, 1356.[5]

By virtue of its decision in this case, the Fifth Circuit carved out a limited and restrictive exception to the well-established harmless error standard of Chapman, *supra* and its progeny - an exception that applies only to prosecutions based solely on casual eyewitness identification. Such a departure from well established jurisprudence requires the review of this Court.

B. Defendant's Constitutional Right To Testify On His Own Behalf

Every defendant has the constitutional right to stand behind the impenetrable shield of the Fifth Amendment and remain silent in any criminal proceeding against him. He also has the has the equally fundamental right to throw down this shield, should he desire, and choose instead to wield the mighty sword guaranteed him by the Constitution, testifying in his own defense. In the instant matter, the Fifth Circuit denied this opportunity to Petitioner by affirming the trial court's erroneous ruling that he did not require a brief continuance of

[6]See also United States v. Versaint, 849 F. 2d 827,832 (3d Cir. 1988) in which the court held that failure to allow the defense to introduce a police report containing evidence of the identification upon which reset the government's case "prevented the defense from introducing relevant, significant evidence to support Versaint's claim of misidentification" and therefore could not be said to have constituted harmless error.

trial in order to be able to testify.

This right of an accused to testify in a criminal proceeding lies at the inner core of the American ideal of due process and justice. As this Court has observed, such a guarantee draws on sources in the Fifth Amendment right against compulsory self-incrimination (a "necessary corollary" of which is the defendant's right to testify "in the unfettered-exercise of his own will"), the Sixth Amendment right to compulsory process which "logically include[s]" a defendant's "right to testify himself" and the Fourteenth Amendment due process right to a "fair adversary process" including a "right to be heard and to offer testimony". **Rock v. Arkansas**, ___ U. S. ___, 107 S. Ct. 2704, at 2709-2710; **Criminal Procedure**, LaFave and Isreal, Vol.3, §23.3 (1988 pocket part , p. 13)

In its opinion, The Fifth Circuit held that the trial court's determination that the Petitioner was not prevented from testifying on his own behalf due to his temporary medical disability of extreme anxiety was not clearly erroneous. (Appendix "A", p. 6.) Petitioner urges, to the contrary, that the denial of his continuance request prohibited him from and exercising his constitutional right to testify in any meaningful and fundamentally fair manner.

Petitoner presented uncontradicted and unimpeached sworn testimony in support of his request for a brief medically necessitated continuance. Dr. Richoux, who testified on the Sunday evening before the trial was to commence, offered expert psychiatric testimony about Dr. Alexander, based on his forty-five (45) minute examination of him that night and his two (2) year psychiatrist-patient relationship with him, stating:

....it was apparent to me that Dr. Alexander was probably more anxious than I 've ever seen him during the two-year period or over two-year period that I have now known him. (1 Supp. R. 47).

....

... I don't think that right now he is capable of testifying in the same manner in which he would have been at the point of all my previous in-person contacts with him. He, in my opinion, would have considerable difficulty responding as alertly and responding as accurately, perhaps, to some of the things that might be posed to him were he testifying as would normally be the case, and I don't think it's possible to (sic) what extent that's true, because he is on 40 milligrams of Valium and to what extent it is because he is in a state of extreme anxiety and distress. I'm sure both are contributing factors. (1 Supp. R. 53-54)

Dr. Richoux was so concerned about Dr. Alexander's condition that he verified that someone would be staying with him "literally around the clock." *Id.* at 48. He further reported to the court as an expert in forennsic psychiatry that:

My opinion is that Dr. Alexander is in a state of extreme acute anxiety at the present time. He also is depressed, but actually the anxiety and the depressive symptoms are both clearly evident. He is tearful. He has a tendency right now to be somewhat less organized in his thinking than what is normally the case with him, and at the present time he is under the influence of 40 milligrams, which is giving him, in my opinion, somewhat of an inappropriately lackadaisical attitude, for a lack of a better term. (1 Supp. R. 52).

....

I think he looks extremely tired, which he is. In

addition to which he looks like somebody on 40 milligrams of Valium. Most people on 40 milligrams if they're not asleep look like they're drowsy or drugged. They have sort of a glazed look about them, which he has to some degree right now, and he looks generally drawn and exhausted. (*Id* at 53.)

In addition, the Fifth Circuit failed to consider the sworn testimony of defense counsel who had represented Dr. Alexander since his arrest in 1985, and described his condition to the trial court in the following manner:

> ...I can truthfully say that I have never seen him in a worse state. What I have seen in the last week is not just the normal stress that he has in dealing with that situation, but a total almost falling apart. I have not had one conversation with him this entire week that he has not burst into tears, sometimes at moments that were unexpected by myself, sometimes at moments that were dealing with some troubling aspect of the trial. He has forgotten things that I asked him to do, which is totally unlike Dr. Alexander who never forgets anything, and is always calling up reminding everybody to do things. He has been unable to respond to things with any speed and has just absolutely been unable to assist me in doing anything necessary to prepare for Monday. (1 Supp. R. 31-32)
>
> ....
>
> Q And do you believe that Dr. Alexander, on the witness stand on direct examination, would maximize his chances of making the proper presentation as he did at the last trial?
>
> A No, neither in appearance nor in response.
>
> Q Do you believe that Dr. Alexander could answer and be in control of his responses on cross examination at the upcoming trial?

A Not at all.

Q In his current mental state?

A Not at all.

Q In the manner in which he did at the last trial?

A Not at all.

Q As his attorney at the first trial and one of his attorney's at the second trial, what is your opinion of the comportment of Dr. Alexander in presenting himself properly to a jury?

A I think it's crucial in this case, when the evidence is what it is. (*Id* at 34-35).

In deciding to accept the testimony of a court appointed cardiologist who testified that the Petitioner could physically endure the stress of trial because he was was not suffering from organic heart disease rather than the uncontradicted expert testimony presented by the defense as to the inability of the Petitioner to testify on his own behalf, the Fifth Circuit committed the same error as the trial court. In view of the reversible nature of this temporary medical disability if the Petitioner were allowed a period of ten (10) to fourteen (14) days to acclimate to anti-depressant medication, the balance, given the constitutional nature of the right involved, clearly weighed in favor of a continuance.

Deprived of the ability to exercise his constitutional right to testify, Dr. Alexander was prohibited from presenting evidence with exculpatory potential to the fact finder and was denied his due process guarantee to a "fair opportunity to defend against the State's accusations." **Chambers v. Mississippi**, 410

U. S. 284, 294 (1973). Undeniably, Dr. Alexander's testimony would have gone to the heart of the issue, *i.e.*, that he was at his apartment/office working on a letter to asbestos-exposed workers he was soon to examine and therefore, he did not commit the robbery in question. The favorable nature of the evidence to be presented by the defendant and the significance of it in a prosecution based solely on uncorroborated casual eyewitness identification is glaringly evident.

> It is and was unmistakable, undisputed and obvious that [Dr. Alexander's] testimony would have been highly relevant and significant and in no meaningful sense cumulative. It plainly had exculpatory potential and would have enhanced his defense. **United States v. Ray E. Walker**, 722 F. 2d 1172, 1179. (5th Cir. 1985).

This is especially so when one considers that after hearing such competent and relevant testimony, the jury in Dr. Alexander's first trial, without benefit of any expert scientific testimony, deliberated for over eight (8) hours before reaching a verdict and at one point during the deliberation sent a written communication to the trial judge hat it was deadlocked. (3 R. 678).

In the instant case, the fact that the Petitioner could coherently and intelligently relate to the trial court his difficulty with concentration, memory, organization and emotional control in the face of no cross examination by the Government is not dispositive of the issue and did not justify a finding adverse to the Petitioner by the trial court.

Ineluctably, the trial court's denial of the defense requested continuance precluded the defendant from presenting critical alibi testimony for the time of the robbery - without a doubt, highly relevant and material evidence that was a crucial accompaniment to the testimony of the photographic expert. There was no other witness capable of presenting this evidence to the jury. In effect, the trial court deprived Dr. Alexander "who above all others may be in a position to meet the prosecution's case", **Ferguson v. Georgia**, 365 U.S. 570, 582 (1961) of the "only testimony potentially effective to his defense" (as per **United States v. Fessel**, *supra* at 1280) of mistaken identification, and consequently stripped him of his defense. There can be no doubt but that in a prosecution based solely on uncorroborated casual eyewitness identification, the defense was materially prejudiced by the inability of Dr. Alexander to testify in his own behalf.

The Fifth Circuit ruled in stark contrast to its previously articulated acknowledgment of the inherent significance of a defendant testifying in his own defense at trial:

> ...Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance.
>
> ....
>
> Apart from what appellant would have testified to, his presense on the stand would have afforded him the opportunity to have the jury observe his demeanor and judge his veracity firsthand. As one Circuit Judge has noted, "The facial expressions of a witness may convey much more to the trier of facts than do the spoken words." **United States v. Irvin**, 450 F. 2d

968, 971 (9th Cir. 1971) (Kilkenny, J.. dissenting). We conclude that the character of this "eyeball testimony," as a matter to be weighed in determining whether the district court should have permitted Walker (or in this case, Dr. Alexander) to testify on Monday, is also a factor falling on the side of appellant. United States v. Ray E. Walker, *supra* at 1179.

Because the denial of a continuance for the purpose of enabling the Petitioner to testify in his own behal occurred in a prosecution based solely on casual eyewitness identification with no corroborating evidence, it is a constitutional error of the most serious magnitude. Such a situation requires the intervention of this Court.

CONCLUSION

An innocent man stands before this Court wrongfully convicted of a bank robbery he did not commit.[6] No physical evidence whatsoever of the crime in question was ever discovered in this case, which is based solely on casual eyewitness identification, about which this Court has observed:

> ...the annals of criminal law are rife with cases of mistaken identity. .. What is the worth of

---

[6] At the time of his sentencing on February 24, 1988,Dr. Alexander told the trial judge 1988,

> With all due respect to this Court, I must declare again, quietly but without any qualification whatever, that I am now as I have always been entirely innocent of this crime for which I was convicted based solely on evidence of mistaken eyewitness identification.(23 R.3)

identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. United States v. Wade, 388 U. S. 218, 288 (1967.)

The fundamental right of a defendant to present a full and effective defense was further eroded by the excessive discovery violation sanction imposed by the trial court herein. Dr. Alexander was precluded from introducing documentary evidence and police testimony of the first photographic lineup held in this case which was conducted by the New Orleans Police Department. This lineup contained all six (6) of the fill-in mugshots later used in the second photo lineup which was conducted by the FBI. As a result, the defendant was denied the opportunity to show the jury evidence vital to the defense of mistaken identification in a case based on uncorroborated eyewitness identification.

In addition, Petitioner was denied his constitutionally guaranteed right to testify in his own defense when the trial court herein abused its discretion and unreasonably denied the defense request for a brief continuance. Uncontradicted medical expert testimony established that Dr. Alexander required a ten (10) day to two (2) week period of medical treatment and psychotropic medication to enable him to take the witness stand during his trial. The Court's failure to grant this continuance clearly violated the Fifth, Sixth and Fourteenth Amendment rights of Dr. Alexander.

Bank Surveillance Photo of Robber

(taken 5-21-85)

FBI Mugshot of Dr. Alexander

(taken 5-24-85)

WHEREFORE, because this Court has the authority and responsibility to weigh both the individual and cumulative effect of the errors raised herein, the Petitioner prays that his Application for Writ of Certiarari be granted.

Respectfully Submitted,

SHEILA C. MYERS
700 Camp Street
New Orleans, Louisiana 70130
Telephone: (504) 528-9500

Attorney for Petitioner

Certificate of Service

I certify that a copy of the foregoing Writ of Certiorari Appellant has been furnished to Jan Maselli Mann, Esq., the Assistant United States Attorney in the Eastern District of Louisiana handling this matter, by United States Mail, postage prepaid and properly addressed this 26th day of June, 1989.

SHEILA C. MYERS

APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee
v.
Victor ALEXANDER, M.D.,
Defendant-Appellant
No. 88-3143

United States Court of Appeals,
Fifth Circuit
March 28, 1989.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, SMITH and DUHE, Circuit Judges.

GEE, Circuit Judge:

In 1986 the defendant was convicted of robbing a savings and loan association. That conviction was reversed on appeal.[1] *See United States v. Alexander*, 816 F.2d 164 (5th Cir.1987)

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1. The grounds for the appeal and reversal of the defendant's first conviction are irrelevant to this appeal.

The defendant was retried and again convicted in August 1987 despite his mistaken identity defense. The defendant appeals this second conviction contending that the district court committed reversible error in denying a defense motion for a continuance. The defendant also contends that the district court erred in precluding the introduction of allegedly crucial defense evidence. We conclude that the district court did not abuse its discretion in denying the defendant's request for a continuance. We further conclude that the district court's error, if any, in precluding the introduction of evidence was harmless. Consequently we affirm the defendant's conviction.

I. *The Facts*

The retrial of the defendant was originally scheduled to begin on July 13, 1987. At the request of the defense the trial was continued until Monday, August 3. On Friday. July 31, at approximately 4:30 p.m. the defendant filed a motion to continue the trial a second time. As a basis for this motion the defendant alleged that he was physically unable to withstand the rigors of a trial and that he was suffering from acute anxiety which lessened his ability to participate in the trial to the same extent that he had participated in the first trial, i.e., taking the stand in his own behalf to present alibi testimony. The government objected to any further continuance.

On Friday evening, the district court held an expedited hearing on the defendant's motion. The defense called no witness at the hearing. It did, however, submit a handwritten letter from an internist who had examined the defendant earlier

in the day. This letter was largely illegible. According to defense counsel the letter stated that the defendant had acute pains in his left shoulder and had been prescribed heart medication. Defense counsel also alleged that the defendant's mental condition had worsened over the previous two weeks. Following the hearing the district court advised the parties that he would appoint a cardiologist to examine the defendant as soon as possible.

The court-appointed cardiologist, Dr. Lawrence O'Meallie testified on Saturday, August 1. Dr. Lawrence O'Meallie stated that he had examined the defendant and found no evidence of heart disease. Dr. Lawrence O'Meallie further testified that there was no reason why the defendant could not endure the trial. The defendant then testified regarding his physical and mental condition. Finally, the defendant's psychiatrist, Dr. Richard Richoux, testified. Dr. Richoux stated that "... I don't think that right now [the defendant] is capable of testifying in the same manner in which he would have been at the point of all of my previous in-person contacts with him." Dr. Richoux also testified, however, "I don't think [the defendant's] anxiety can be said to be the result of mental disease or defect."

Following the hearing the district court denied the defendant's motion to continue. The district court conceded that the medical testimony was that "the defendant is suffering acute anxiety that lessens his ability to participate as he participated in his last trial." The district court also noted, however, that "the defendant does not suffer from any mental

defect or disease that renders him unable to understand the nature or consequences of the offense, or to assist counsel." In addition, after the defendant testify the court stated:

> It appears to me, having listened to the [defendant] for more than the past 30 minutes, that he is rational, thoughtful, coherent, calm, allert [sic], and I might say exceptionally allert [sic], very responsive, and his memory for detail seems to be extraordinary.

The district court, in denying the defendant's motion, weighed the impact of the defendant's lessened ability against the impact on the government and in the context of the Speedy Trial Act and concluded that the interest of justice required that the trial proceed as scheduled.

There was no physical evidence linking the defendant to the robbery. However, at trial several witnesses identified the defendant as the person who had robbed the savings and loan association. These witnesses had also identified the defendant as the robber two years earlier, when presented with a throw down (photographic) lineup by the FBI. Defense counsel cross-examined each of these witnesses regarding their identification of the defendant as the robber.

During the presentation of the defendant's case, after the close of the prosecution's case in chief, the defense attempted to introduce evidence of a secord throw down allegedly conducted by the New Orleans police department before the FBI conducted its throw down. The defense alleged that this throw down had been shown to two of the three eyewitnesses. According to the defense, all of the photographs used in the FBI throw down except that of the defendant had been used in

the previous throw down. The defense contended that the use of the same photographs in both throw downs tainted the identification process.

The government moved to exclude the evidence on two grounds: First, the government contended that the evidence was unreliable; Second, the government contended that defense counsel's failure to disclose the existence of evidence until the fourth day of trial immediately prior to attempting to introduce evidence violated the discovery order in the case. The district court excluded the evidence as a sanction for discovery abuse.

II. *The Motion For Continuance*

[1] The defendant contends that the district court's denial of his motion for a continuance constituted reversible error. The grant or denial of a continuance is generally within the sound discretion of the trial court and will be disturbed on appeal only for an abuse of that discretion. *United States v. Sahley*, 526 F.2d 913, 918 (5th Cir.1976). The defendant contends that in this case the district court's denial of a continuance deprived him of his right to call witnesses on his behalf, i.e., himself, and therefore constituted an abuse of the court's discretion. In support of this contention the defendant cites *United States v. Miller*, 513 F.2d 791 (5th Cir.1975).

In *Miller* we found no abuse of discretion in a trial court's denial of a continuance to obtain a testimony of an alibi witness. We implied, however, that denial of a continuance to obtain an alibi witness would be an abuse of the trial court's

discretion if the moving party had met the required standards, stating that, in order to prevail on such a motion, the movant must demonstrate that

> due diligence had been exercised to obtain the attendance of the witness, that substantial evidence would be tendered by the witness, that the witness is available and willing to testify, and that the denial of the continuance would materially prejudice the defendant.

Id. at 793 (citations omitted). According to the defendant he met the requirements of Miller and, therefore, the denial for his request for a continuance was an abuse of discretion because it deprived him of the testimony of an alibi witness.

Unfortunately for the defendant, his reliance on *Miller* is misplaced. The *Miller* requirements come into play onl if the denial of a continuance would prohibit the defendant from presenting the testimony of an alibi witness. In this case the denial of a continuance did not have that effect. The district court found, based on the testimony of the court-appointed cardiologist, that the defendant's physical condition would not preclude his participation in the trial. The district court further found, based on the testimony of the defendant's psychiatrist, that the defendant was suffering from acute anxiety, but that the defendant was not suffering from any disease or defect which would prevent him from assisting in his own defense or from testifying in his own behalf. This finding is supported by the evidence and is not clearly erroneous. The district court did not, therefore, abuse its discretion in denying the defendant's request for a continuance.

III. *Exclusion Of Evidence*

[2] At trial the defense attempted to introduce evidence of a throw down allegedly conducted by the New Orleans police department prior to the throw down conducted by the FBI.[2] The defense alleged that six of the seven photographs used in the FBI throw down were black and white copies of color photographs previously shown to two of the three witnesses by the New Orleans police. The defense alleges that the only photograph in the FBI throw down that had not been previously considered and rejected by the witnesses was the photograph of the defendant. According to the defense, this fact tainted the identification process and supported the defendant's mistaken identity defense.

The defense admitted having possession of the photographs allegedly used in the New Orleans police throw down on the first day of trial. The defense did not, however, disclose the fact of the existence of the throw down or the defense's possession of it to the prosecution until the fourth day of trial, moments before attempting to introduce it into evidence. The prosecution objected to the introduction of the evidence on the grounds that the defense had violated the discovery order in failing to disclose the evidence at the time the defense gained possession of it. The prosecution also

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2. The prosecution denies that the New Orleans Police Department ever conducrted a throw down. For purposes of this appeal, however, we will assume that a prior throw down was conducted.

noted that the defense had the opportunity each of the state's eye witnesses and had failed to ask any of them about any throw down except that conducted by the FBI.

Rule 16(d)(2) of the Federal Rules of Criminal Procedure permits a court to prohibit the introduction of evidence not disclosed in compliance with Rule 16. "... [S]uch a sanction is not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment...." *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The defendant contends, however, that under the rule of *Taylor* that sanction is appropriate only if there is pattern of discovery violations and wilful misconduct. He further contends that no such pattern or wilful misconduct was present in the instant case. Consequently, the defendant argues that a lesser sanction should have been imposed.

The Supreme Court's decision in *Taylor* gives us little guidance for determining when the preclusion sanction is permisible. Clearly, it is permissible in egregious situations in which counsel deliberately and consistently violates discovery orders. The prosecution would have us hold that a preclusion sanction is permissible in any case in which the discovery abuse "was wilful and motivated by a desire to obtain a tactical advantage..." *Id.* 108 S.Ct. at 655-56. Further, the prosecution would have us find that the abuse in this case was motivated by such a desire and that, therefore, preclusion was a permissible sanction. This we need not do as we find that error, if any, in precluding the evidence in this case was harmless.

The defense contends that the New Orleans PoliceDepartment throw down was shown to two of three employee eye witnesses who identified the defendant. Accepting this contention as true, the identification by the third witness remains untainted. The untainted witness is Ms. Ozio, who was the victim/teller in this robbery. She, of all the witnesses, had the best opportunity to observe the perpetrator of the robbery. There is neither claim nor evidence that Ms. Ozio was ever shown any throw down except that prepared by the FBI. Ms. Ozio identified the defendant as the robber both from his photograph in the throw down and from his in-court appearance. Under these circumstances we find that admitting the excluded evidence would not have altered the outcome of this trial.

The judgment of the district court is, therefore,

AFFIRMED.

APPENDIX "B"

UNITED STATES of America,
Plaintiff-Appellee

v.

Victor ALEXANDER, M.D.,
Defendant-Appellant
No. 88-3143

United States Court of Appeals,
Fifth Circuit
March 28, 1988

Appeal form the United States District Court for the
Eastern District of Louisiana

ON SUGGESTIONS FOR REHEARING EN BANC

Before GEE, SMITH, and DUHE,
Circuit Judges.

PER CURIAM:

Treating the suggestions for rehearing en banc as petitions

for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. Nor member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

April 27, 1989

APPENDIX "C"

UNITED STATES of America,
Plaintiff-Appellee

v.

Victor ALEXANDER, M.D.,
Defendant-Appellant
No. 88-3143

United States Court of Appeals,
Fifth Circuit
March 28, 1988
D.C. Docket No. CR-85-243-G (5)

Appeal form the United States District Court for the
Eastern District of Louisiana

Before GEE, SMITH, and DUHE,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

ISSUED AS MANDATE: May 8, 1989

APPENDIX "D"

In its opening remarks, the prosecution laid the foundation for its case, telling the jury:

You will hear these three ladies explain that although they saw him for only a short period of time, they had a very good opportunity to see him... and they're absolutely positive Victor Alexander is the robber. (17 R. 87)

. . . .

I would ask that you pay close attention, ladies and gentlemen, to the first three witnesses that the government presents to you today. Those three bank employees. They are the only eyewitnesses to the crime that you're going to hear from and they're all positive that Victor Alexander's the one that robbed them.
(17 R. 89-90)

The full degree to which the prosecution rested its case on the strength of the combined eyewitness identification is ineluctably clear from the repeated references made in closing argument to the collected force of three positive eyewitnesses.

What does all of that add up to? Victor Alexander is the robber. All three ladies not only told you about picking out the defendant's picture in a lineup, they also identified him in person prior to doing so again last Monday and Tuesday and ladies and gentleman they didn't tell you they believe it's him. They said they are positive it's him. None of these three women have a reason to lie to you, and they made no mistake. ... and if we're going to ignore the testimony of these three ladies, we might as well take the word eyewitness out of the dictionary, because you're never going to find or hear about a case where the identifications are more positive than here in this case (22 R. 942-943)

. . . .

If all the government had to offer you as proof that this man committed a bank robbery was those pictures, you wouldn't be sitting here right now, ladies and gentlemen, but when not one, and not two, but three women independently identified the defendant and tell you with their heart, with their minds and with their eyes that they know it's him, you just can't walk away from that...(22 R. 944)

. . . .

They didn't want anything about those pictures to deceive those three women. Are those three women so weak minded that a little piece of tie shown in a photograph... (22 R. 982)

. . . .

Why would these three people pick the wrong man? So that the guy that really robbed the bank is still out there in the street? What motive did they have to identify the wrong man? None (22 R. 983)

. . . .

Not one person has identified him as the bank robber. Not two, but three. It's not your job to take these deceptive photographs, these illusions and base a judgment on them. You have another method. Three honest citizens who had every opportunity to change their mind about the identification they made in this case. Three women with no motive whatsoever to deceive you. Three women who are not putting before you an illusion. Three people who realized the consequences of what they have come into court, took an oath and swore to God that's the guy that robbed the bank. They are not mistaken. (22 R. 988)

. . . .

Ladies and gentlemen, don't be deceived. Don't be taken in by the trick, the illusion these photographs seem to create. There were six lenses in Central Savings and Loan on May 21, 1985 that were in full color, that were not distorted, that were not wide angles, and from those six lenses, three permanent

indelible photographs were produced. They belong to those three women. They saw him clearly. They saw him close up. They were positive when they testified on every occasion. don't let the defense illusion and deception fool you. Don't be deceived by I am a doctor. Don't reject three normal citizens. Don't let him just walk away again. Thank you. (22 R. 988-989).

APPENDIX "E"

Curriculum Vitae

Victor Alexander, M.D.

Current Professional Positions

Medical Director
Enviro-Health Systems, Inc.

Managing Partner
Enviro-Medicine Associates

Business Address

990 North Bowser Road
Suite 800
Richardson, TX 75081
(214) 234-5577

Canal Place One
Suite 2300
New Orleans, LA 70130
(504) 521-8880

Home Address

2905 C Tennessee Avenue
Kenner, LA 70065
(504) 443-1148

Date of Birth

May 23, 1949

Place of Birth

Los Angeles, California

Marital Status

Separated

Social Security Number

155-40-9575

Education

Harvard University 1967-70
Cambridge, MA 71-72
A.B. - History of Science
Magna cum laude

CMDNJ-Rutgers Medical School
Piscataway, NJ 1972-74
M.M.S. - Medical Sciences

Harvard School of Public Health
Boston, MA 1974-76
M.S.P.H. - Health & Policy Management
M.S. - Industrial Hygiene

Washington University Medical School
St. Louis, MO 1976-78
M.D.

U.S. Public Health Service Hospital
Baltimore, MD 1980-81
Intern - Internal Medicine

Honors and Awards

A.B. - Magna cum laude;

Dean's List - 1967-68, 1969-70, 1971-72;

New York City Harvard Club Scholar - 1967-70, 1971-72;

Sperry & Hutchinson Foundation National Scholar - 1967-70, 1971-72;

Health Professions Scholarship - 1973-74;

Trainee Fellowship, DHEW - 1974-76;

U.S. Public Health Service Scholarship - 1976-78;

Distinguished Achievement Awards - U.S. Dept. of Labor

March 1981 - Texas Brain Cancer Investigation;

March 1981 - International Health Hazard Alert System;

March 1981 - OSHA Lead Standard Appendix C.

Employment

Medical Director, Enviro-Health Systems, Inc, New Orleans, LA, September 1984 - present;

Managing Partner, Enviro-Medicine Associates, New Orleans, LA, September 1984 - present;

Chairman, Department of Occupational Medicine, Ochsner Foundation Hospital, New Orleans, LA, July 1982 - September 1984;

Head, Department of Preventive and Occupational Medicine, Ochsner Foundation Hospital, New Orleans, LA, September 1982 - September 1984;

Staff Physican, Center for Occupational and Environmental

Health, U.S. Public Health Service Hospital (Wyman Park Health System), Baltimore, MD, July 1981 - July 1982;

Medical Officer, Occupational Safety & Health Administration, U.S. Department of Labor, Washington, DC, August 1978 - July 1982;

Contract Medical Officer, Occupational Safety & Health Administration, U.S. Department of Labor, Washington, DC, May 1978 - August 1978.

Medical Licensure

Missouri - September 1978, #35936
Louisiana - January 1983, #05931R

Professional Certification

National Institute for Occupational Safety & Health
Pneumoconiosis Certified "A" Reader - February 1980
Pneumoconiosis Certified "B" Reader - May 1980;

American Board of Preventative Medicine
Board Certified - Occupational Medicine - January 1982.

Hospital Affiliations

U.S. Public Health Service Hospital (Wyman Park Health System), Baltimore, MD, July 1981 - July 1982;

Ochsner Foundation Hospital, New Orleans, LA,

September 1982 - present.

Consultant Appointments

Louisiana Governor's Task Force on Environmental Health;
National Cancer Institute;
National Institute of Environmental Health Sciences;
National Institute of Health - Ad Hoc Study Section;
National Institute for Occupational Safety & Health.

Professional Organizations

American Association for the Advancement of Science;
Collegium Ramazzini (Fellow);
New York Academy of Sciences.

Committees

American Journal of Industrial Medicine
Contributing Editor, August 1983 - present;

Interagency Regulatory Liaison Group (IRLG)
Research Planning Committee, August 1979 - August 1981;

Interagency Testing Committee (TSCA-EPA)
Member, February 1980 - June 1980;

International Conference on Ambient and Biological Monitoring in the Workplace,

Luxembourg, December 8-12, 1980

Scientific Secretariat Member, August 1979 - July 1980;

International Lung Cancer Update Conference, New Orleans, LA, March 3-5, 1983

Co-Chairman, Environmental Hazards Session;

Louisiana Emergency Medical Services Council

Conference Co-Chairman, Hazardous Materials Incidents Conference, New Orleans, LA, January 10, 1983;

Mayor's Advisory Council on Hazardous Materials, New Orleans, LA

Member, April 1984 - present;

National Cancer Institute (NCI)

Asbestos Education Task Force, May 1978 - December 1979;

External Contract Review Panel, Carcinogenicity Studies in Rodents RFP, April 1979 - September 1979;

National Cancer Advisory Board (NCI)

Ex-Officio Member, January 1980 - July 1982;

Environmental Carcinogenisis Subcommittee, January 1980 - July 1982;

National Toxicology Program (NTP)

Executive Staff Assistant, December 1978 - July 1980;
Chemical Selection Committee, February 1979 - July 1980;

Maguire Report Subcommittee, June 1979 - July 1982;

Occupational Safety and Health Administration

Cancer Policy Priority Work-Group, February 1980 - July 1980;

Ochsner Clinic

Cost Coalition Committee, July 1982 - October 1982;

Task Force on Preferred Provider Organizations, October 1982 - September 1984;

Publisher - Ochsner Clinic MMWR Reprint Edition, March 1983 - September 1984;

World's Fair Committee, May 1983 - September 1984;

World's Fair Exhibit Committee, May 1983 - September 1983;

Ochsner Foundation Hospital

Safety and Health Committee, August 1982 - September 1984;

AOMF Cancer Institute Cancer Committee, November 1982 - October 1983;

Continuing Education Committee, May 1983 - September 1984;

Infections Committee, May 1983 - September 1984;

Radiation Control Committee, May 1983 - September 1984;

Society for Occupational and Environmental Health

Recording Secretary, International Commission, June 1978 - August 1979;

Membership Committee Chairman, January 1980 - December 1980;

U.S. Department of Health and Human Services

U.S. - Egypt Environmental Health Subcommittee, June 1979 - July 1982;

U.S. - Peoples Republic of China Environmental Health Subcommittee, October 1979 - July 1982;

Workplace Health Fund, Washington, D.C.

Member, Commission on Health Care, November 1983 - present.

Publications

Samuels, S. and V. Alexander, Government Surveillance of High-Risk Worker Groups, Supplementary Testimony before the U.S. Senate Labor Subcommittee, June 1977, U.S. Senate, Washington, D.C., 1978.

Alexander, V., Analysis of NIOSH New York Times VDT/CRT Survey, Hearings on Radiation Health and Safety, U.S. Senate Committee on Commerce, Science, Transportation, June 1977, U.S. Senate, Washington, D.C., 1978.

Stein, H.P. et al., NIAX Catalyst ESN, American Industrial Hygiene Association Journal, 40(3): A-36, 1979.

Bahlman, L.J. et al., Vinyl Halides: Carcinogenicity, American Industrial Hygiene Association Journal, 40(3): A-30, 1979.

West, D. et al., Radiofrequency (RF) Sealers and Heaters: Potential Health Hazards, American Industrial Hygiene Association Journal, 41(3): A-22, 1980.

Alexander, V., Health Hazard Alerts in the United States, in Workshop on International Health Hazard Alerts, Commission of the European Communities, Luxembourg, 1980.

Alexander, V. et al., Brain Cancer in Petrochemical Workers: A Case Series Report, American Journal of Industrial Medicine, 1:115, 1980.

Alexander, V. et al., Investigation of an Apparent Increased Prevalence of Brain Tumors in a U.S. Petrochemical Plant, Annals of the New York Academy of Sciences, 381:97, 1982.

Reeve, G.R. et al., A Progress Report: The Investigation of Brain Tumors at the Texas Division of Dow Chemicals, Annals of the New York Academy of Sciences, 381:61, 1982.

Alexander, V., Reporting Asbestosis to OSHA, Letter to the Editor, Journal of Occupational Medicine, 24:891, 1982.

Wexweiler, R.J. et al., Mortality from Brain Tumor and Other Causes in a Cohort of Petrochemical Workers, Journal of the National Cancer Institute, 70:75, 1983.

Presentations

Occupational Exposure to Estrogens: A Review of the Literature, NIOSH Conference on Estrogens, Cincinnati, OH, February 9, 1978.

Panel on Medical Surveillance, 1st Annual AFL-CIO Conference on Occupational Safety and Health,

Washington, DC, September 13, 1978.

Seminar-Medical Students, Washington University Medical School, St. Louis, MO, September 22, 1978.

Medical Grand Rounds-Occupational Health, St. Luke's Hospital, St. Louis, MO, October 31, 1978.

New Directions Seminar, American Medical Association, Chicago, IL, November 16-17, 1978.

OSHA and Medical Surveillance, East Tennessee State Medical School, Johnson City, TN, February 6, 1979.

OSHA's Medical Surveillance Requirements, International Operating Engineer's Fifth Annual Safety and Health Conference, Chicago, IL, May 3, 1979.

Seminar-Occupational Medicine Residents, Johns Hopkins University Medical School, Baltimore, MD, May 21, 1979.

Seminar-Medical Students, University of Connecticut Medical School, Farmington, CT, May 24, 1979.

OSHA's Form 200, Organization Resources Counselor's Medical Directors Meeting, Washington, DC, June 12, 1979.

Seminar-Preventive Medicine Residents, Johns Hopkins University Medical School, Baltimore, MD, July 17, 1979.

Health Hazard Alerts in the United States, Workshop on International Health Hazard Alerts, Luxembourg, September 18, 1979.

Report on the IRAC Mineral Fibers Conference in Lyon, France, DHHS-CCERP Committee, Bethesda, MD, October 23, 1979.

Comparision of National Standards for Vinyl Chloride, Asbestos, and Nickel, Workshop on Occupational Health Standards, International Commission on Occupational and Environmental Health, Mt. Saint Marie, Canada, November 9, 1979.

Seminar-University of Cincinnati Medical School, Cincinnati, OH, November 19, 1979.

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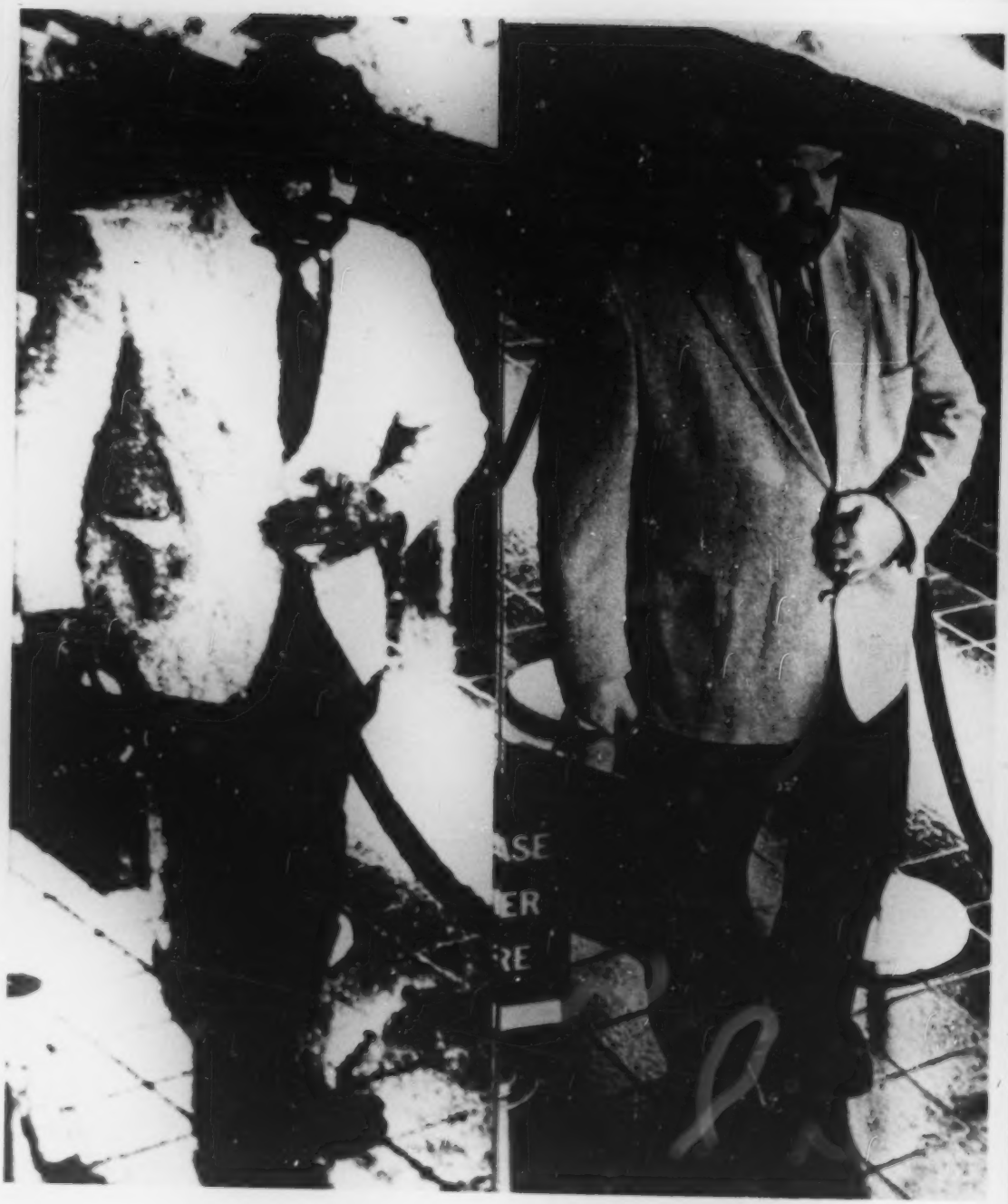

APPENDIX "F"

Surveillance Photo of Robber Posed Photo of Dr. Alexander

A P P E N D I X "F"

Surveillance Photo of Robber Posed Photo of Dr. Alexander

No. 89-485

In the Supreme Court of the United States

OCTOBER TERM, 1989

VICTOR ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that any error in the exclusion of evidence offered by petitioner was harmless.

2. Whether the denial of a continuance effectively denied petitioner the right to testify on his own behalf.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 869 F.2d 808.

JURISDICTION

The judgment of the court of appeals (Pet. App. C1-C2) was entered on March 28, 1989. A petition for rehearing was denied on April 27, 1989. Pet. App. B1-B2. The petition for a writ of certiorari was filed on June 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner

was convicted on one count of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to three years' imprisonment. The court of appeals affirmed.[1]

1. The evidence at trial is summarized in the opinion of the court of appeals and in the government's court of appeals brief. Pet. App. A4-A5; Gov't C.A. Br. 4-23.

At about noon on May 21, 1985, a bank in New Orleans, Louisiana, was robbed by a heavy-set man, approximately six feet tall, with dark hair and a dark beard, wearing sunglasses and carrying an attache case. After waiting in a rope line, the robber approached teller Tracy Ozio and handed her a note instructing her to hand over money from her drawer. She complied. Assistant branch manager Jeanne Soignet, who was in the next teller station, saw the robber hand Ozio the note, spoke with the robber, and also gave him money from her drawer. Two video cameras and a 35mm surveillance camera recorded the robbery. Gov't C.A. Br. 4-5.

Ozio, Soignet, and bank receptionist Eurilda O'Rourke had opportunities to see the robber during the course of the robbery. All three picked petitioner's photograph from a photo array presented to each of them separately by an FBI agent three days after the

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[1] Petitioner had been previously tried and convicted of the same offense. The court of appeals reversed that conviction on the ground that the district court had erroneously excluded expert testimony offered by the defense. See *United States* v. *Alexander*, 816 F.2d 164 (5th Cir. 1987).

robbery, and all three identified petitioner as the robber at trial. Gov't C.A. Br. 4-8.

The government also introduced evidence that petitioner had suffered financial difficulties in the months just before the robbery, including credit card cancellations, defaulted loans, suspensions of banking privileges, and mortgage foreclosure proceedings. Gov't C.A. Br. 8.

2. The petition presents questions arising from the denial of a motion for a continuance that petitioner made on the eve of trial and the exclusion of certain evidence offered by petitioner.

a. Petitioner's second trial was originally scheduled to begin on July 13, 1987. At his request, the trial was continued until Monday, August 3. On Friday, July 31, petitioner sought another continuance, claiming that he would be unable to withstand the rigors of a trial and that he was suffering from acute anxiety that would undercut his ability to testify on his own behalf. Pet. App. A2.

The district court immediately commenced a hearing on petitioner's motion and continued the hearing over the weekend. On Friday evening, petitioner offered only a "largely illegible" handwritten letter from an internist that, according to petitioner's counsel, indicated that the internist had examined petitioner the day before and had prescribed heart medication for him. Counsel also stated that petitioner's mental condition had worsened over the previous two weeks. Pet. App. A2, A3; Gov't C.A. Br. 27-29.

The court appointed a cardiologist to examine petitioner. On Saturday, the cardiologist testified that he had found no evidence of heart disease, that petitioner had been able to communicate effectively with

him during the examination, and that there was no reason why petitioner would be unable to withstand the rigors of a trial. Petitioner then testified concerning his physical and mental condition. Pet. App. A3. He disclosed that during the previous week he had performed his normal work and had prepared for his trial. Gov't C.A. Br. 28. After petitioner had completed his testimony, the district court observed (Pet. App. A4):

> It appears to me, having listened to [petitioner] for more than the past thirty minutes, that he is rational, thoughtful, coherent, calm, allert [sic], and I might say exceptionally allert [sic], very responsive, and his memory for detail seems to be extraordinary.

The district court allowed petitioner to present testimony by his psychiatrist the following day. The psychiatrist testified that, before being contacted by the defense the day before (Saturday), he had not seen petitioner for several weeks. Based upon a consultation shortly before he testified, the psychiatrist's opinion was that although petitioner was not "capable of testifying in the same manner in which he would have been at the point of all of [the doctor's] previous in-person contacts with [petitioner]," petitioner's anxiety could not "be said to be the result of mental disease or defect." Pet. App. A3; Gov't C.A. Br. 30. The district court denied the motion for a continuance.

b. After the government had completed its case in chief, petitioner called Detective Ron Richards of the New Orleans Police Department (NOPD) as a witness. Through Richards, petitioner sought to introduce what appeared to be a page from an NOPD daily report and eight color photographs of persons other than petitioner. According to the report, which was dated the day after

the bank robbery, Richards showed the photographs to two of the eyewitnesses to the bank robbery, Soignet and O'Rourke, and another individual, Rosa Mitchell; none of the witnesses made an identification. Black and white copies of six of the photographs were later used in the photo array – presented by the FBI to Soignet, Ozio, and O'Rourke – from which these witnesses chose petitioner's photo. Petitioner argued that Soignet's and O'Rourke's identifications were tainted because petitioner's photograph was the only one in the FBI array that they had not previously seen and rejected. Pet. App. A4-A5; Gov't C.A. Br. 10, 12-13.

The district court conducted a hearing out of the presence of the jury to determine the admissibility of the evidence. The FBI agent who had conducted the photo arrays from which Ozio, Soignet, and O'Rourke selected petitioner's photograph testified that he had no knowledge of any photographic identification procedure other than the one he had conducted. Officer Richards testified that although the presence of his name on the report (which was typed, not signed) indicated that he prepared it, he could not remember preparing it or taking any of the actions attributed to him. Specifically, although he recalled riding with the FBI agent to the bank when the agent conducted his photo identification procedure, Richards could not remember himself showing a photo array to any of the witnesses.[2]

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[2] In September 1987, in connection with petitioner's motion for a new trial, Soignet and O'Rourke provided affidavits stating that each had been shown only one photo display, by the FBI agent, and that no one from the NOPD had shown them photographs in connection with the robbery. Gov't C.A. Br. App. I.

Richards recalled, however, that he had not told the FBI agent that he had conducted a photo array. Memorandum and Order 6-7 (Jan. 22, 1988) [hereinafter Dist. Ct. Mem.]; Gov't C.A. Br. 12-14.[3]

The NOPD file on the robbery had previously been subpoenaed in September 1985, in connection with a suppression hearing that preceded petitioner's first trial. At that time, it did not include the purported daily report and accompanying photographs. See Gov't C.A. Br. 12, 41. Before the commencement of the second trial, petitioner's counsel issued a subpoena duces tecum to Richards directing him to produce the file. (Petitioner's counsel stated that she first suspected that a second photo array had been shown to some witnesses about a month before the trial. *Id.* at 11; see Dist. Ct. Mem. 15.) An NOPD officer delivered the file to petitioner's counsel on the first day of the trial. Counsel took possession of the file without notifying the government or the court of its production. Although Fed. R. Crim. P. 16 requires parties to provide reciprocal discovery of documents and photographs that are intended for use as evidence, petitioner's counsel also failed to produce the daily report or the accompanying photographs to the government before calling Richards to the stand. Dist. Ct. Mem. 15. During cross-examination of the government's witnesses, petitioner's counsel made no reference to any claimed photo identification procedure other than the one conducted by the FBI. The government received no notice whatever of petitioner's evidence until after the government rested. *Ibid.*

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[3] We have lodged copies of the district court's Memorandum and Order with the Clerk.

The district court excluded the evidence. In an opinion denying petitioner's motion for a new trial, the court cited three alternative grounds for that ruling. First, it concluded that any probative value that the evidence might have would have been outweighed by its prejudicial effect. The court explained that the proffered evidence would not have "cast any significant doubt on" the identifications made in connection with the FBI array; that all eyewitnesses "independently identified [petitioner] as the robber in court on two separate occasions"; that there was no suggestion that the principal eyewitness, Ozio, had been shown two photo arrays; and that the admission of the evidence "would have created the misleading impression that the government had tried to suppress this evidence." Dist. Ct. Mem. 9-10. Second, finding that the daily report was "completely lacking in trustworthiness" (*id.* at 12), the court concluded that Officer Richards' testimony was insufficient to establish any exception to the hearsay rule. *Id.* at 10-14. Finally, the court held that the defense's "violation of the criminal discovery rules," *i.e.*, the failure to make a timely disclosure of the evidence to the government, "also justified exclusion of the evidence." *Id.* at 14.[4]

3. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A9. The court concluded

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[4] Fed. R. Crim. P. 16(c) provides that if a party discovers evidence that is subject to discovery or inspection "prior to or during trial," the party "shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence." If a party violates a discovery obligation imposed by Rule 16, the court is authorized to "prohibit the party from introducing evidence not disclosed." Fed. R. Crim. P. 16(d)(2).

that the district court had not abused its discretion in denying petitioner's motion for continuance. *Id.* at A5-A6. The court found it unnecessary to determine whether the exclusion of evidence of the identification procedure allegedly conducted by Officer Richards was justified as a sanction for the defense's violation of Rule 16; the panel concluded that "admitting the excluded evidence would not have altered the outcome of this trial" and, accordingly, that any error was harmless. *Id.* at A7-A9.

ARGUMENT

1. Petitioner contends (Pet. 9-19) that the district court erred by excluding evidence that a second photo array was shown to two of the identification witnesses and that the court of appeals incorrectly determined that any such error was harmless. In his view, the court of appeals improperly failed to apply the harmless error test recognized by this Court in *Chapman* v. *California*, 386 U.S. 18 (1967). Pet. 12.

There is no merit to those contentions. Under *Chapman*, a violation of a defendant's constitutional rights is harmless when it is established "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. Here, while the court of appeals did not cite *Chapman* or use the language of that opinion, it held that "admitting the excluded evidence would not have altered the outcome of this trial." Pet. App. A9. The court of appeals' harmless error determination was entirely consistent with the requirements of *Chapman*, and it was fully supported by the record.

As the court of appeals noted, it was undisputed that the principal witness against petitioner, teller Ozio,

was exposed to only one photo array. All three eyewitnesses had good opportunities to see the bank robber; two of the witnesses were face-to-face with him as he demanded money. All three identified him as the robber from the FBI photo display three days after the crime. As the district court held in denying a motion to suppress these identifications, the witnesses "independently recognized his face and features." See *United States* v. *Alexander*, 816 F.2d 164, 170 (5th Cir. 1987). The court of appeals' assessment of the weight of the identification testimony against petitioner was amply justified and does not raise any issue deserving of further review.[5]

Moreover, although the court of appeals found it unnecessary to reach the question, the district court's decision to exclude evidence of the alleged second photo identification procedure did not violate petitioner's constitutional rights. In *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988), this Court held that a defendant does not have "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." See also *United States* v. *Nobles*, 422 U.S. 225, 241 (1975). Rather, the right to present evidence is subject to compliance

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[5] The photographs included in the petition cast no doubt on the court of appeals' harmless error determination. Although an expert called by petitioner provided an opinion, based on those photographs, that petitioner was not the robber, the expert conceded that the bank's photographs were subject to distortions that would affect a comparison. Gov't C.A. Br. 9-10, 15-16. In rebuttal, the government called an FBI expert in photographic comparison who demonstrated how various distortions in the bank's photographs and in petitioner's comparison photographs undermined petitioner's expert's opinion. *Id.* at 17-23.

with "firm, though not always inflexible, rules relating to the identification and presentation of evidence." *Taylor* v. *Illinois*, 484 U.S. at 411. Thus, while a trial court confronted with a violation of a criminal discovery rule "may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor," a willful and tactically motivated violation may justify exclusion of such evidence. *Id.* at 414-415.[6]

Petitioner does not dispute the district court's finding that the defense's failure to produce the daily report and accompanying photographs was a violation of Fed. R. Crim. P. 16. Moreover, the circumstances of this case justify the inference that this violation was deliberate and tactically motivated. Although petitioner's counsel conceded that she suspected a month before trial that there had been a second array and that she had possession of the evidence of such an array on the first day of trial, the defense withheld all notice of the evidence until after the government had rested. Significantly, petitioner's counsel chose not to raise the possible existence of a second array even during cross-examination of the eyewitnesses to whom that array had allegedly been shown, presumably to make it impossible for the government to address that allegation during its case in chief. As in *Taylor*, "the inference

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[6] See, *e.g.*, *Cox* v. *Wyrick*, 873 F.2d 200 (8th Cir. 1989) (preclusion of alibi testimony proper sanction for failure to respond to pretrial motion to produce names and addresses of alibi witnesses); *Chappee* v. *Vose*, 843 F.2d 25 (1st Cir. 1988) (preclusion of expert testimony proper sanction for defense's deliberate withholding of names of expert witnesses contrary to discovery agreement).

that [petitioner] was deliberately seeking a tactical advantage is inescapable." 484 U.S. at 417.

The district court recognized that its discretion to exclude the evidence was "limited by the Compulsory Process Clause," Dist. Ct. Mem. 16, but nevertheless concluded that exclusion was the appropriate sanction. By failing to provide timely discovery, the defense deprived the government of the opportunity, which Rule 16 is specifically designed to safeguard, to address the evidence during its case in chief. As petitioner's counsel undoubtedly foresaw, injecting the issue of a possible second array for the first time as part of the defense case could have created the completely unwarranted impression that the government had sought to cover up the existence of such an array. Further, the district court found that the circumstances surrounding the production of the evidence "cast a serious doubt upon [its] integrity and trustworthiness." Dist. Ct. Mem. 18; see *Taylor* v. *Illinois*, 484 U.S. at 417.[7] Under all of these circumstances, the district court's decision to exclude petitioner's evidence did not violate the principles recognized in *Taylor*.

Finally, the district court determined that the evidence was inadmissible even under the Rules of Evidence. Officer Richards could not recall preparing the purported daily report, which did not bear his signature, or conducting the identification procedure to which it referred. Based upon the insufficiency of this testimony and a finding that the daily report was "com-

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[7] As was noted above, the two eyewitnesses who, according to the daily report, were shown a photo array by Officer Richards subsequently provided affidavits stating that the only array they were shown was the FBI array. Gov't C.A. Br. 46 & App. I.

pletely lacking in trustworthiness" (Dist. Ct. Mem. 12), the district court held that petitioner had not established a foundation for any exception to the hearsay rule (*id.* at 13-14). The court also held that the evidence was inadmissible under Fed. R. Evid. 403 because "the danger of unfair prejudice to the government's case and of misleading the jury substantially outweighed the probative value of the evidence." *Id.* at 10. These evidentiary determinations would be sufficient to sustain petitioner's conviction, regardless of the disposition of the issues argued in the petition.

2. Petitioner also seeks further review of the denial of his eleventh-hour motion for a continuance. Pet. 19-26. A review of the circumstances surrounding the continuance motion, however, shows that there was more than sufficient justification for the district court's conclusion that petitioner's condition did not warrant a second continuance.

Trial courts have broad discretion to control their dockets, and the denial of a continuance can be reversed only for an abuse of that discretion. *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); see also *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). In this case, the district court denied petitioner's motion for a continuance on the basis of its determination "that [petitioner] was not suffering from any disease or defect which would prevent him from assisting in his own defense or from testifying in his own behalf." Pet. App. A6. Both the circumstances surrounding the motion and the evidence adduced during the hearing on the motion support the district court's finding.

After a week during which petitioner performed his ordinary work and assisted in the preparation of his defense, he filed a motion near the close of business on

the last working day before the trial was scheduled to begin. The motion was supported initially only by a handwritten letter by an internist suggesting that petitioner might have a heart condition. The district court, nevertheless, went out of its way to give full consideration to the issues raised by the motion. It immediately appointed a cardiologist to examine petitioner and received testimony on petitioner's condition over the weekend. The cardiologist testified that petitioner showed no evidence of heart disease, and the district court concluded, based on its own observation of petitioner's testimony, that petitioner was rational, thoughtful, coherent, calm, alert, responsive, and in full command of his memory.[8] Finally, although petitioner had not seen his psychiatrist for several weeks before filing the motion for a continuance, the court allowed petitioner an opportunity to consult with the psychiatrist and to present his testimony. The psychiatrist's testimony was ambivalent. While suggesting that petitioner would be able to testify more effectively if the trial were postponed, the psychiatrist conceded that petitioner's anxiety was not the result of mental disease or defect. Pet. App. A3.

Thus, contrary to petitioner's contention, there was no "uncontradicted" (Pet. 23, 27) evidence that he was incapable of testifying on his own behalf.[9] Rather,

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[8] It was entirely proper for the court "to consider its observations of" petitioner "in ascertaining his physical and mental capabilities." *E.g.*, *United States* v. *Brown*, 821 F.2d 986, 989 (4th Cir. 1987).

[9] Indeed, the description of the evidence that petitioner's counsel provided to the jury in her opening statement suggested that petitioner would be called to testify. See 17 R. 91-96.

testimony from petitioner's psychiatrist and the court-appointed cardiologist, along with the court's own observation of petitioner's condition, presented "classic credibility questions" that the district court was entitled to resolve in favor of adherence to the scheduled trial date. *United States* v. *Brown*, 821 F.2d 986, 990 (4th Cir. 1987). Applying an appropriately deferential standard of review, the court of appeals upheld the district court's finding that petitioner was capable of participating in his trial and testifying on his own behalf, and it declined to disturb the district court's exercise of its discretion to control its trial docket. Pet. App. A6.[10] These determinations present no question of general importance calling for this Court's review.[11]

During the trial, the defense did not suggest that there had been any change in petitioner's condition that might have disabled him from testifying.

[10] The court's decision to deny the continuance was further supported by the prejudice that a delay would have caused to the government. Several of the government's out-of-town witnesses had already arrived for the trial. Additionally, the prosecutor who had tried the case originally and was to handle the retrial was nearing the end of her pregnancy. A further delay in the trial might have required the assignment of a new prosecutor. Gov't C.A. Br. 27, 37.

[11] Other courts of appeals have upheld denials of continuances sought for health reasons at least as serious as those alleged by petitioner. See, *e.g.*, *United States* v. *Brown*, *supra* (defendant was in his sixties and had previously been hospitalized for strokes and other ailments); *United States* v. *Costello*, 760 F.2d 1123 (11th Cir. 1985) (defendant *pro se* had attempted suicide on morning of sentencing hearing and had been treated with Valium); *Bernstein* v. *Travia*, 495 F.2d 1180 (2d Cir. 1974) (defendant's previous myocardial infarction and current symptoms of angina pectoris made him especially vulnerable to a heart

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1990

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attack); *United States* v. *Silverthorne*, 430 F.2d 675, 677 (9th Cir. 1970), cert. denied, 400 U.S. 1022 (1971) (defendant suffered from aggravated high blood pressure).

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